Supreme Court of the United States

JANUARY TERM, 1967.

Office-Supreme Court, U.S.
FILED,
JAN 20 1967
JOHN F. DAVIS, CLERK

No. 986

NATHALIE L. DUPONT,
Respondent,

versus

SOUTHERN PACIFIC COMPANY,
Petitioner.

VELMA MARGARET DUPONT, Individually and next friend for MARK VILLEJOIN,
Respondent,

versus

SOUTHERN PACIFIC COMPANY,
Petitioner.

NATHALIE LEGER, ET AL.,
Respondents,

versus

SOUTHERN PACIFIC COMPANY,
Petitioner.

ANNA LOUISE DUPONT TRAHAN, Individually and next friend for MICHAEL JOSEPH TRAHAN,
Respondent,

versus

SOUTHERN PACIFIC COMPANY,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

DAVIDSON, MEAUX, ONEBANE & DONOHOE,
By J. J. DAVIDSON, JR.,
Attorneys for Petitioner,
Post Office Drawer 3507,
Lafayette, Louisiana.

SUBJECT INDEX.

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	3
STATEMENT	3
REASONS FOR GRANTING THE WRIT	4
I. The Cases Were Properly Consolidated for Trial And There Was No Abuse Of Discretion On The Part Of The Trial Judge	4
II. No Conflict Of Interest Was Created By Designating A Lead Counsel For All Parties Plaintiff	15
III. The Survivors Of The Driver Were Not Prejudiced In Any Way By The Consolidation Of Cases And Designation Of Lead Counsel	21
CONCLUSION	23
PROOF OF SERVICE	24
APPENDIX "A"—Opinion of the United States Court of Appeals for the Fifth Circuit	27
APPENDIX "B"—Judgment of the United States Court of Appeals for the Fifth Circuit	42
APPENDIX "C"—Rehearing in this case denied by the Fifth Circuit Court of Appeals	44

TABLE OF AUTHORITIES.

	Page
Atkinson v. Roth, 297 F.2d 570 (3rd Cir. 1961)	6
Baltimore & Ohio Railroad Company v. Felgenhauer, 8th Cir. 1948, 168 F.2d 12	21
Bank of Coushatta v. Burch, 148 So. 681, 177 La. 465	18
Bocchicchio v. Curtis Publishing Company, 203 F.Supp. 403, D.C. Penn. 1962	22
Capella v. Zurich General Accident Liability Insurance Company, 194 F.2d 558	12
Compton v. Stanford, 30 La. Ann. 838	18
Cooney v. Rousset, 3 Orleans Appeals, 249	18
Crockett Engineering Company v. Ehret Magnesia Mfg. Co., 156 F.2d 817, 81 U.S. App. D.C. 159	22
Davis v. Yellow Cab Co. of St. Petersburg, 220 F.2d 790 (5th Cir. 1955)	6
Divine v. Zimmerman, 133 F.2d 850	12
Douglas v. Nicholson, 140 La. 1098, 74 So. 566 (1917)	18
Dupont v. Southern Pacific Company, 366 F.2d 193 (1966)	4, 6
Equitable Life Assurance Society of the United States v. Sieg, 6 Cir. 53 F.2d 318	21
Franklin v. Zurich Insurance Company, 136 So.2d 735 (1961)	18
Graf v. Holcombe, 8 Cir. 277 F. 687	21
Home Indemnity Company v. Williamson, 183 F.2d 572 (5th Cir. 1950)	18
Lake City, etc. v. Luehrmann, 113 F.2d 458	11
Leitz Egan Funeral Home v. Ridgley, 189 So. 647 (1939)	18
Miller v. Sammarco, 9 F.R.D. 215 (Ohio, 1949)	11
Nettles v. General Accident Fire & Life Assurance Corporation, 5th Cir. 1956, 234 Fed. 243	11
Orenstein v. United States, 191 F.2d 184	12

TABLE OF AUTHORITIES—(Continued):

Page

Poulson v. Louisiana, Arkansas & Texas Trans. Co., D.C. La. 1947, 7 F.R.D. 484 11
Penn v. Burke, 152 So.2d 16, 244 La. 267 (1963) 18
Petersen v. Chicago Great Western Railroad Company, 138 F.2d 304 12
Plough v. Baltimore & O. R. Co., 172 F.2d 396 (2nd Cir. 1949) 6, 11
Polito v. Molasky, 123 F.2d 258 (8th Cir. 1941) 6
Prieto Lumber Company v. Shoultz, 111 So. 857 (1959) 18
Rosaly v. Gonzales, 106 F.2d 169 12
Smailes v. O'Malley, 127 F.2d 410 12
Stoma v. Smith, 172 So.2d 202 18
Valley Shoe Corporation v. Stout, 8 Cir. 98 F.2d 514 21
Walker v. Loop Fish & Oyster Co., 211 F.2d 777 (5th Cir. 1954) 6
Whiteman v. Pitrie, 220 F.2d 914 (5th Cir. 1955) ... 6

Secondary Authorities.

5 Moore's Fed. Practice, Par. 42.02, p. 1204 (2nd ed. 1964) 6

Federal Rules of Civil Procedure:

Rule 42 (a) 3, 5, 24
Rule 61 ..... 5, 24

SUPREME COURT OF THE UNITED STATES
JANUARY TERM, 1967.

No.

NATHALIE L. DUPONT,
Respondent,

versus

SOUTHERN PACIFIC COMPANY,
Petitioner.

VELMA MARGARET DUPONT, Individually and next friend for MARK VILLEJOIN,
Respondent,

versus

SOUTHERN PACIFIC COMPANY,
Petitioner.

NATHALIE LEGER, ET AL.,
Respondents,

versus

SOUTHERN PACIFIC COMPANY,
Petitioner.

ANNA LOUISE DUPONT TRAHAN, Individually and next friend for MICHAEL JOSEPH TRAHAN,
Respondent,

versus

SOUTHERN PACIFIC COMPANY,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The Southern Pacific Company, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above entitled case.

OPINIONS BELOW.

There is no written opinion on the merits by the District Court in *Dupont v. Southern Pacific Company;* the opinion of the United States Court of Appeals for the Fifth Circuit in this case (Appendix "A", *infra,* p. 27) is reported at 366 F.2d 193.

JURISDICTION.

The judgment of the United States Court of Appeals for the Fifth Circuit in *Dupont v. Southern Pacific Company* (No. 22,412) was entered on September 21, 1966, (Appendix "B" *infra,* p. 42). A rehearing

in this case was denied by the Fifth Circuit Court of Appeals on October 24, 1966 (Appendix "C", *infra*, p. 44). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED.

1. Whether the Court of Appeals for the Fifth Circuit can disregard the broad discretion granted the District Judge by Rule 42 (a) of the Federal Rules of Civil Procedure and find reversible error in the District Judge's consolidation of cases and designation of lead counsel where there is no showing in the record that the consolidation and designation of lead counsel affected the substantial rights of the parties.

STATEMENT.

On June 25, 1961, a Southern Pacific Company train struck an automobile at a railroad crossing in Lafayette Parish, Louisiana. There were three passengers in the automobile in addition to the driver, and all four of the occupants of the automobile were killed in the collision. As a result of this accident, eleven separate law suits were filed by various survivors of the four decedents. These eleven law suits, pursuant to rulings on certain motions, were reduced to four law suits, one by the survivors of the driver, and one by the survivors of each of the three guest passengers. These suits bear civil action numbers 8896, 9113, 9114

and 9124 on the docket of the United States District Court for the Western District of Louisiana.

By an order dated August 15, 1963, the District Judge *sua sponte* ordered these four cases consolidated for trial, and designated Mr. J. Minos Simon, attorney of record for the survivors of the three deceased passengers, as lead counsel to handle the presentation of the plaintiffs' cases (R. 184).

After a trial to a jury, a general verdict was returned in favor of the defendant, Southern Pacific Company, in each of the four cases presented. The plaintiffs appealed from the decision, and the Fifth Circuit Court of Appeals reversed and remanded all four of the cases stating that the consolidation of the cases brought by the survivors of the guest passengers with the case brought by the survivors of the driver, and the designation of a lead counsel to represent all plaintiffs was an abuse of the trial judge's discretion and "created an impossible situation which resulted in neither set of plaintiffs receiving the representation to which they are entitled." *(Dupont v. Southern Pacific Company, 366 F.2d 193, 197 (1966).)*

REASONS FOR GRANTING THE WRIT.

I. The Cases Were Properly Consolidated For Trial And There Was No Abuse Of Discretion On The Part Of The Trial Judge.

It is submitted by defendants herein that the judgment of the Court of Appeals for the Fifth Circuit is

in error in concluding that the consolidation of these four cases was an abuse of discretion on the part of the trial judge, and the decision of the Fifth Circuit so holding seriously restricts the discretionary powers of the trial judge which are granted under Federal Rule of Civil Procedure 42 (a).

Rule 42 (a) provides:

> "Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

Federal Rule 61 provides the general rule for determining whether reversible error in the proceedings at trial has been committed by stating, in part, that:

> "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

The general rule concerning the discretion of the trial judge under Rule 42 (a) of the Federal Rules of Civil Procedure is well stated by the Fifth Circuit Court of Appeals in their decision in this case as follows:

> "(1) Trial judges are urged to make good use of Rule 42 (a) of the Federal Rules of Civil Pro-

cedure where there is involved a common question of fact and law as to the liability of the defendant in order to expedite the trial and eliminate unnecessary repetition and confusion; and where the parties are represented by different counsel and the trial court permits full and complete development of the evidence by all parties, equal opportunity for argument, a clear and complete charge on the facts and the law applicable to the respective theories of all parties, the order of consolidation by the trial judge will not be disturbed on appeal except for abuse of discretion. Whiteman v. Pitrie, 220 F.2d 914 (5th Cir. 1955); Plough v. Baltimore & O.R. Co., 172 F.2d 396 (2nd Cir. 1949); Davis v. Yellow Cab Co. of St. Petersburg, 220 F.2d 790 (5th Cir. 1955); 5 Moore's Fed. Practice, Par. 42.02, p. 1204 (2nd ed. 1964); Walker v. Loop Fish & Oyster Co., 211 F.2d 777 (5th Cir. 1954); Polito v. Molasky, 123 F.2d 258 (8th Cir. 1941)." *(Dupont) v. Southern Pacific Company, 366 F.2d 193, 195.)*

However, after properly stating the general rule and recognizing the jurisprudence in the area of consolidation of cases for trial, the Fifth Circuit, relying heavily on the case of *Atkinson v. Roth, 297 F.2d 570 (3rd Cir. 1961)*, concluded that consolidation in the instant cases constituted an abuse of the trial judge's discretion and required that the cases be reversed and remanded for a second trial. As was ably pointed out by Judge Thornberry, dissenting in *Dupont v. Southern Pacific Company*, the case of *Atkinson v.*

Roth, supra, is not controlling here. A brief examination of the factual situation in the *Atkinson* case will clearly point out its inapplicability.

In *Atkinson* seven different law suits arising out of a single collision between an automobile and a truck were consolidated for trial. Atkinson was the driver of the automobile, and there were five guest passengers in his vehicle. Atkinson himself appeared as plaintiff in one suit, as defendant in another, as third party defendant in two other suits, and as defendant and third party plaintiff in the remaining three suits. The verdicts against the plaintiffs in the various suits were based on the answers returned by the jury to special interrogatories submitted to them, and no general verdict was rendered.

The third circuit in *Atkinson v. Roth* relied on several matters in reversing certain of the verdicts rendered. The chief among these was the confusion resulting from certain instructions given the jury concerning contributory negligence. The Court further noted, with regard to the instructions, that the trial court failed to charge the jury that the negligence of Atkinson (the driver) could not be imputed to his passengers, such failure being basic error in Pennsylvania. Finally, the Court noted that the motion to consolidate should not have been granted because the consolidation burdened the parties, the court and the jury with an *overcomplication of issues and necessary instructions.* In closing this discussion of the various problems created by the consolidation in this instance, the Court stated:

"All of the suits stating claims by passengers or their representatives however, could proceed without conflict. But Atkinson as a plaintiff was obliged to keep his case free of contributory negligence, and in this he was at cross purposes with the other plaintiffs. The presence of Atkinson, *qua* defendant, in the same trial with Atkinson, *qua* plaintiff, emphasizes the conflict. *In these circumstances,* proper concern for due administration of justice seems to indicate to us the wisdom of avoiding another trial in which Atkinson appears as a plaintiff along with his passengers or their representatives." (Emphasis added.)

The instant case presents a factual situation which contrasts sharply with the mass confusion created by consolidation of the cases in *Atkinson v. Roth.* An examination of the pleadings in each of the four cases with which we are here concerned shows that the only defendant in each case is the Southern Pacific Company, and that the only allegations of negligence in any of the four cases are against the Southern Pacific Company.

Mrs. Nathalie Leger Dupont in her suit for the death of her son, Bussey Dupont, (Civil Action #8896), affirmatively alleged in her complaint that Trahan, the driver, made a careful and prudent approach to the crossing, and because of the obstructions to the view, he was unable to discover the presence of the train in sufficient time to avoid being struck by it. (Article VII of the complaint.) In Article VIII of the complaint,

she alleged that the negligence of Southern Pacific Company's employees was the, or a proximate cause of the collision and the death of Bussey. The only defendant was Southern Pacific Company.

Mrs. Nathalie Leger Dupont, in Civil Action #9114 was joined by her children in suing for the death of Lucien Dupont, a passenger. In the complaint, it is affirmatively alleged that the accident and the death of the said Lucien Dupont was caused solely and proximately by the gross negligence of defendant's agents, i.e., agents of Southern Pacific Company. (Article III of the complaint.) The only defendant was Southern Pacific Company.

In Civil Action #9113, "Velma Margaret Dupont, et al. vs. Southern Pacific Company," the suit for the death of Claude David Villejoin, another passenger, plaintiffs affirmatively alleged in Paragraph III of their petition:

> ". . . that the death of the said Claude David Villejoin resulted solely and proximately from the negligence of the agents of said Defendants here."

The only defendant was Southern Pacific Company.

In Civil Action #9124, Anna Louise Dupont Trahan, et al. vs. Southern Pacific Company, the survivors of the driver alleged in Paragraph III of the complaint:

> ". . . that the death of the said Andrus Joseph Trahan resulted solely and proximately from the negligence of the agents of said Defendant herein."

Each of the four suits was answered by defendant, Southern Pacific Company, on the basis that the Southern Pacific Company was guilty of no negligence and that each of the respective defendants was guilty of independent contributory negligence. No issue of imputation of negligence was raised by defendants.

Subsequent to the answer of defendant, a pre-trial stipulation was filed in this case in which all of the parties were required by the District Court to set forth their respective contentions. Plaintiffs never included therein any contention whatever by the survivors of the passengers that the driver of the automobile was also negligent. Furthermore, in the joint pre-trial brief filed by all Plaintiffs, the following is found:

> "The issues as to Defendant's liability are essentially the same as to the various Plaintiffs, with the important exception of the effect of any contributory negligence on the part of the driver, Andrus Trahan, *although all Plaintiffs deny there was any contributory negligence on the part of any of the four occupants of the automobile.*" (Emphasis ours.)

After discussing in some detail the facts which they proposed to prove on the trial of the case, *all* of the Plaintiffs argued on Page 5 of their pre-trial brief:

> "Thus, it was not Trahan's failure to stop which prevented his being aware of the approaching train, but the other circumstances mentioned . . . It is plain that *Trahan was guilty of no negligence* as would bar recovery by his heirs.

> "But, the remaining Plaintiffs also point out that if he had been negligent in failing to stop, look and listen, and if this failure be deemed a proximate cause of the accident, still there was no such negligence on the part of the other three occupants of the car."

The Court, having all of the issues before it, in pleadings, briefs and pre-trial stipulations correctly concluded that there was no obstacle to the consolidation, that the different rules of law applicable to the survivors of the driver and the passengers could be adequately covered by the instructions, and that the cases could be consolidated and tried without prejudice. *Plough v. Baltimore & Ohio Railroad Company, 172 F.2d 396 (2nd Cir. 1949); Nettles v. General Accident Fire & Life Assurance Corporation, 5th Cir. 1956, 234 Fed. 243; Miller v. Sammarco, 9 F.R.D. 215, (Ohio, 1949); Poulson v. Louisiana, Arkansas & Texas Trans. Co., D.C. La. 1947, 7 F.R.D. 484.*

The Court, *sua sponte*, ordered the cases consolidated. Thereafter, for the first time, Plaintiffs raised the issue of conflict of interest and objected to the consolidation. It is submitted that the Plaintiffs, by their briefs, pleadings, arguments, and pre-trial stipulations led the court to the conclusion that no conflict of interest existed, and they cannot complain about it by adopting an entirely different contention to the effect that a conflict of interest did, in fact, exist. *Lake City, etc. v. Luehrmann, 113 F.2d 458; Capella v. Zurich General Accident Liability Insurance Com-*

pany, 194 F.2d 558; Orenstein v. United States, 191 F.2d 184; Divine v. Zimmerman, 133 F.2d 850; Petersen v. Chicago Great Western Railroad Company, 138 F.2d 304; Smailes v. O'Malley, 127 F.2d 410; Rosaly v. Gonzales, 106 F.2d 169.

As the only concern of the plaintiffs, shown by their briefs, stipulations and pleadings, appears to be the possible effect of the contributory negligence of the driver, the instructions of the court on this point become pertinent. These instructions were as follows:

> "As to the passengers, guest passengers in a car, however, the relationship is different. Under ordinary circumstances, a person riding in an automobile is entitled to rely upon the driver to use reasonable and ordinary care for his safety, and he is not required to monitor or attempt to control the operation of the vehicle, unless he has actual knowledge that the driver is incompetent or unfit to perform the function of driving the car. He is not required to look out for sudden or unexpected dangers that may arise on the road. In such cases, if the driver of the vehicle is negligent, his negligence will not be imputed or charged against the passenger in the car, and the passenger may recover even if the driver be found contributorily negligent, provided, of course, you find the defendant guilty of negligence which was a cause in fact, or proximate cause of the accident, as heretofore discussed." (R. 612-613.)

Thus, in comparing this case to *Atkinson v. Roth*, we find that here the jury was correctly instructed on imputation of negligence, none of the parties appear in the case as both plaintiff and defendant, the driver of the automobile was not faced with the problem of "keeping his case free from contributory negligence" any more than were the passengers who were also obliged to keep their cases free from contributory negligence, and, in the case of both the driver and the passengers, the only allegations of contributory negligence in the pleadings were raised by the common defendant, Southern Pacific Company.

Though it is well settled law that an appellate court cannot assume the jury disregarded the instructions given it by the trial judge (see authorities cited on page 21, *infra*), the Fifth Circuit concluded that the jury in this case disregarded its clear and concise instructions and imputed the negligence of the driver to the guests merely because the jury first returned a verdict only against the driver. The pertinent language of the court is as follows:

> "The four cases as consolidated were tried to a jury; and after several hours of deliberating, the jury returned a verdict in favor of defendant against the survivors of the driver. Whereupon, without disclosing what the verdict was, the trial court instructed the jury to continue its deliberations and to return a verdict in all four cases. Sometime thereafter the jury returned four general verdicts in favor of the defendant and against all of the plaintiffs." (366 F.2d 193, 195.)
>
> . . .

"In view of the jury verdict and the manner in which it was returned, we must conclude that some confusion existed with the probability that the jury in some way imputed the negligence of the driver to the guest passengers contrary to the instructions of the court, all of which resulted to the prejudice of the parties caused by the order of consolidation with the designation of a lead counsel to represent all of the plaintiffs." (366 F.2d 193, 198.)

However, the record clearly shows that the jury, by returning only one verdict, intended to reject all claims and was attempting to follow the court's instructions in doing so. We call specific attention to pages 617 and 618 of the transcript of testimony where in the court, in explaining to the jury how to prepare its verdict, made reference to the verdict forms in the dirver's case and stated:

"On the other hand, if your verdict in this case, *or any of the others,* should be for the Defendant, you use this form (Court reads,)

"We, the Jury in the above entitled and numbered cause, find in favor of the Defendant, Southern Pacific Company, and against the Plaintiff Anna Louise Dupont Trahan, widow of Andrus Joseph Trahan, and Michael Joseph Trahan, son of Andrus Joseph Trahan."

"Date it and have your foreman sign it."

The Court clearly indicated that the jury should use the Trahan form of verdict if the verdict in the Trahan case, or any of the others, was for the Defendant. The Jury simply followed his instructions and used that form of verdict for all of them. When advised by the Court that a separate verdict must be returned in each case, the jury did so in five minutes, which clearly indicates the original verdict returned against the driver only was intended to apply to all plaintiffs.

It would be difficult to imagine a case in which there are more common issues of law and fact and less possible conflicts between the contentions of the various parties than we have presented here. Consequently, it is submitted that the trial judge acted properly in consolidating the cases for trial and no prejudice whatever resulted to any of the parties by virtue of the consolidation.

II. No Conflict Of Interest Was Created By Designating A Lead Counsel For All Parties Plaintiff.

The Fifth Circuit Court of Appeals in reversing these cases, placed heavy emphasis on the alleged conflict of interest created by the appointment of lead counsel to represent both the plaintiffs who were the survivors of the driver of the automobile and the plaintiffs who were the survivors of the passengers in the automobile. From an examination of the contentions set forth in the complaints, pre-trial stipulation and pre-trial briefs it clearly appears there is no conflicting interest which might be held by the survivors

of the driver as opposed to the survivors of the passengers. Of course, had the survivors of the passengers joined the driver's estate as a party defendant in their various suits and alleged that the demise of the passengers was caused through the joint negligence of the driver and the Southern Pacific Company, there could be some basis for finding a conflict of interest. However, as previously pointed out, the sole allegation of negligence in each of the four complaints, plaintiffs' joint pre-trial brief and joint pre-trial stipulation was made against the sole defendant, Southern Pacific Company, and the driver's estate was never named as party defendant in any of the cases. The sole allegation of contributory negligence raised by the plaintiffs arose in the plaintiff's motion opposing the consolidation of the cases for trial, and would appear to be merely an afterthought on their part. The Fifth Circuit Court of Appeals stated that:

> "In representing all plaintiffs, lead counsel must contest contributory negligence on the part of the driver, but in doing so he increases his burden and prejudices the interest of his clients, the survivors of the passengers, since the negligence of the driver not being imputed to the passengers would permit the survivors of the passengers to recover notwithstanding a finding of contributory negligence on the part of the driver."

It appears, that the situation of all of the parties with respect to the negligence of the others is basically the same. Each plaintiff had to contend with the allegation by defendants that the accident was caused

by the negligence of each of the decedents. Again, the plaintiffs were not suing each other, but all were bringing their full claim to bear against the Southern Pacific Company and each alleged that the proximate cause of the accident was the negligence of the defendant, Southern Pacific Company. Had there been any serious contention by any of the parties plaintiff that their case was based on the contributory negligence of the driver as well as the alleged negligence of the Southern Pacific Company, such an allegation would have appeared in the pleadings. However, the pleadings in these cases show that there is no claim of contributory negligence by the survivors of the passengers against the survivors of the driver, and these pleadings are judicial confessions.

The plaintiffs cannot simply brush aside the allegations which they made in their pleadings, because they are bound by them. The courts have always recognized the sanctity of judicial proceedings and the binding character of judicial allegations made by the parties in court.

Article #2291 of the Civil Code of Louisiana provides:

> "The judicial confession is the declaration which the party, or his special attorney in fact, makes in a judicial proceeding.
>
> It amounts to full proof against him who has made it.
>
> It cannot be divided against him.

It cannot be revoked, unless it be proved to have been made through an error of fact. It cannot be revoked on a pretense of an error of law."

The fact that a party is bound by his judicial allegations has often been emphasized in the jurisprudence.

"A party will not be permitted to deny what he has solemnly acknowledged in a judicial proceeding. The only means of the Court to protect the integrity of judicial proceedings are the sanctity which the law throws around them." *Cooney vs. Rousset, 3 Orleans Appeals, 249.*

"A person will not be permitted to deny what he has solemnly acknowledged in a judicial proceeding." *Stoma vs. Smith, 172 So.2d 202.*

"Parties are estopped to deny admissions or declarations, deliberately made by them in judicial proceedings." *Compton vs. Stanford, 30 La. Ann. 838.* See also: *Douglas vs. Nicholson, 140 La. 1098, 74 So. 566 (1917); Bank of Coushatta vs. Burch, 148 So. 681, 177 La. 465; Prieto Lumber Company vs. Shoultz, 111 So. 857, (1959); Leitz Egan Funeral Home vs. Ridgley, 189 So. 647 (1939); Penn vs. Burke, 152 So.2d 16, 244 La. 267 (1963); Franklin vs. Zurich Insurance Company, 136 So.2d 735 (1961); Home Indemnity Company vs. Williamson, 183 F.2d 572 (5th Cir. 1950).*

In addition to the fact that the complaints, pre-trial briefs, and joint pre-trial stipulation in this case reveal no conflict of interest, it should be noted that

counsel for the survivors of the driver, as well as counsel for the survivors of the passengers who was designated lead counsel, was given a full and complete opportunity to develop the evidence, and equal opportunity for argument. The amended pre-trial order issued on August 22, 1963 provided that:

> "Of course, Mr. Simon will conduct the examination in chief of each witness, and if at the conclusion of his examination, Mr. Mouton feels there are any questions that he should ask, the court will give him permission to do so. . . . I will let Mr. Mouton make an opening statement as well as Mr. Simon, and in the event there are additional questions after Mr. Simon finishes his examination of any witness, he will be permitted to go into questions touching upon negligence of the driver. . . . the pre-trial order of August 15 is modified to this extent and will be modified at the trial as this circumstance may warrant, so that each party will have full rights of examination of all witnesses."

The record reveals no motion or request by either of the counsel for plaintiffs for a modification of the pre-trial order. It would seem only reasonable to expect that any actual conflict which had manifested itself to these attorneys for plaintiffs during the trial would have been brought to the attention of the court. The absence of any information of this type in the record indicates that there was no conflict.

Further, it is clear that Mr. Simon would have acted as lead counsel for all of the plaintiffs in these cases even had there been no order to that effect by the trial judge. This is so because, at the time of the trial of this case, the law firm of Simon & Trice represented all of the plaintiffs, the survivors of the passengers as well as the survivors of the driver. As of April 1st, 1964, Mr. John Rixie Mouton, attorney of record for the survivors of the driver, became employed as an associate by the law firm of Simon & Trice and at all times during the trial of the case, Mr. Mouton was an associate attorney in the firm. Even prior thereto, during the entire preparation of the case for trial, in the taking of depositions, in the preparation of briefs, in arguing the numerous motions which were presented to the District Court, and in all other preliminary matters presented to the District Court, Mr. Simon was the lead counsel for all parties plaintiff. He was in charge of the case. After Mr. Mouton became an employee and associate in Mr. Simon's firm, Mr. Simon continued to be the lead counsel and continued in charge of the entire case for all of the plaintiffs. It was clearly apparent to everyone, including the Lower Court, that Mr. Simon was the lead counsel in all cases, and in appointing lead counsel, he only ordered the continuation of an existing situation. For all practical purposes, therefore, the order of Court, appointing lead counsel did not add designation of lead counsel neither created any conflict of interest in the four cases, nor did it place any any new burden on lead counsel, Mr. Simon.

Considering the foregoing, it is submitted that the

additional burden on Mr. Simon, as lead counsel, and the Fifth Circuit Court of Appeals was in error in relying on this as a ground for reversal of these cases.

III. The Survivors Of The Driver Were Not Prejudiced In Any Way By The Consolidation Of Cases And Designation Of Lead Counsel.

While petitioner strongly urges that there was no error whatever in consolidating these four cases for trial and that the designation of lead counsel in no way prejudiced any of the plaintiffs, it is strongly urged, as an alternative position, that there is no basis whatever for the finding by the Fifth Circuit that the survivors of the driver were prejudiced.

The court concluded there was a probability that the jury had imputed the negligence of the driver to the passengers, contrary to the instructions given by the court, and all the parties were deprived of a fair hearing.

As the jury was very adequately and concisely instructed with reference to the imputation of negligence problem, (see the instruction at p. 12, *supra*) the court's conclusion amounts to a finding that the jury disregarded the instructions of the court. This is contrary to well settled jurisprudence to the effect that, on appeal, the courts may not assume that the jury disregarded the court's instructions. *Baltimore & Ohio Railroad Company v. Felgenhauer, 8th Cir. 1948, 168 F.2d 12; Graf v. Holcombe, 8 Cir. 277 F.687; Valley Shoe Corporation v. Stout, 8 Cir. 98 F.2d 514; Equitable Life Assurance Society of the United States*

v. Sieg, 6 Cir. 53 F.2d 318; Crockett Engineering Company v. Ehret Magnesia Mfg. Co., 156 F.2d 817, 81 U.S. App. D.C. 159; Bocchicchio v. Curtis Publishing Company, 203 F.Supp. 403, D.C. Penn. 1962.

However, even assuming, contrary to the law, that the jury did disregard the instructions given it by the court, this in no way indicates that the case of the survivors of the driver was in any way prejudiced by the consolidation or appointment of lead counsel. In order for the jury to have imputed the negligence of the driver to the guest passengers it would certainly be prerequisite that the jury first find the driver himself negligent. The question of the driver's negligence was clearly a jury question, and was decided in favor of defendant after careful deliberation by the jury. It can hardly be argued that the jury's finding of negligence against the driver is erroneous simply because the jury may possibly have imputed the driver's negligence to the passengers, but this would appear to be the conclusion reached by the Fifth Circuit Court of Appeals.

The lack of prejudice to the survivors of the driver was pointed out by Judge Thornberry in his dissent wherein he stated:

> "I am not convinced that the substantial rights of the driver's survivors were prejudiced by the trial court's action. Their case was more difficult than that of the passengers' survivors; they alone were required to refute any evidence of contributory negligence on the part of the driver. Thus, any confusion in the minds of the jurors resulting

from the consolidation would tend to prejudice the case of the passengers' survivors, not that of the driver's." (366 F.2d 193, 198.)

Judge Thornberry also pointed out that the designation of lead counsel did not create any prejudice to the case presented by the survivors of the driver because of the liberality of the pre-trial order designating lead counsel which allowed attorneys for both groups to examine or cross-examine all witnesses as well as make separate arguments to the jury.

Thus, it appears that no prejudice resulted to those plaintiffs who were suing as survivors of the deceased driver of the automobile by virtue of the consolidation and designation of lead counsel, and it is submitted that the judgment of dismissal as to these plaintiffs entered by the District Court should be reinstated.

CONCLUSION.

By holding that the four cases presented in this consolidated trial were not properly consolidated and that, by the consolidation and designation of lead counsel the trial court abused its discretion, the Fifth Circuit Court of Appeals has severely restricted the scope of the discretion generally given the trial court. As petitioners have attempted to show, these four cases presented no conflicting claims whatever in their pleadings, and were simply four suits against the same defendant arising out of the same collision. To deprive the trial judge of his discretion to consolidate litigation of this nature and to designate one of the attorneys for the various plaintiffs as lead counsel in

order to expedite the proceedings is clearly contrary to the obvious intent of Rule 42 (a) in which the judge is given very broad discretion to consolidate cases and make such other orders as are necessary to avoid unnecessary costs or delay.

It is further submitted that the Fifth Circuit Court of Appeals was in error in relying on the case of *Atkinson v. Roth* as authority in reversing these cases because that case involved a substantially different factual situation, and the only language found therein which bears on the factual situation here presented is dictum taken out of context.

Because the judgment herein constitutes unwarranted interference by the appellate court with the prerogatives granted the trial judge by Rule 42 (a) and Rule 61 of the Federal Rules of Civil Procedure, and because the substantial rights of the plaintiffs were not prejudiced by the trial judge's action, petitioner prays this Honorable Court grant this petition for writ of certiorari.

Respectfully submitted,

DAVIDSON, MEAUX, ONEBANE
& DONOHOE,
By J. J. DAVIDSON, JR.,
Attorneys for Southern Pacific
Company,
201 West Main Street,
Lafayette, Louisiana.

PROOF OF SERVICE.

I, J. J. Davidson, Jr., attorney for petitioner and a member of the bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing petition for writ of certiorari on Mr. J. Minos Simon, c/o Simon, Trice & Mouton, Attorneys at Law, P. O. Box 52116, OCS, Lafayette, Louisiana, and upon Mr. John Rixie Mouton, c/o Simon, Trice & Mouton, Attorneys at Law, P. O. Box 52116, OCS, Lafayette, Louisiana and upon Arceneaux & Beslin, Attorneys at Law, P. O. Building, Rayne, Louisiana, attorneys for plaintiffs by depositing copies thereof in the United States Mail properly addressed to the said attorneys, postage prepaid.

Lafayette, Louisiana, January . . ., 1967.

J. J. DAVIDSON, JR.